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No. A-574

In the Supreme Court of the United States

1984 TERM

JOHN E. GREEN PLUMBING & HEATING COMPANY, INC.
Petitioner,

v.

TURNER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IS IT A DENIAL OF DUE PROCESS OF LAW FOR A CIRCUIT COURT OF APPEALS TO DEPRIVE A PARTY OF THE RIGHT TO TRY AN ACTIONABLE CLAIM BECAUSE THAT COURT SPECULATES THAT THE PARTY'S PROOFS OF ONE ELEMENT OF THAT UNTRIED CLAIM MAY BE INADEQUATE?

II. DID THE CIRCUIT COURT OF APPEALS' FAILURE TO FOLLOW FEDERAL PROCEDURAL STANDARDS AND STATE SUBSTANTIVE LAW IN REVIEWING A DIRECTED VERDICT IN A DIVERSITY ACTION CONSTITUTE A DENIAL OF DUE PROCESS OF LAW?

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LOWER COURT OPINIONS

John E. Green Plumbing & Heating Co., Inc. v *Turner Construction Co.*, 500 F. Supp. 910 (E.D. Mich. S.D. 1980) and 742 F.2d 965 (6th Cir.), *reh'g denied*, (1984).

Jurisdictional Statement

1. Petitioner seeks review of the August 29, 1984 Judgment of the United States Court of Appeals For The Sixth Circuit and of that Court's November 6, 1984 Order denying Petitioner's Petition For Rehearing.

2. On January 25, 1985 this Court granted an extension to March 6, 1985 within which this Petition For Writ Of Certiorari is to be filed.

3. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Relied Upon

Petitioner relies upon the Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statute Relied Upon

Petitioner relies upon 28 U.S.C. § 2111:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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STATEMENT OF THE CASE

Petitioner John E. Green Plumbing & Heating Co., Inc., a mechanical contractor with extensive experience on complex hospital projects, bid as a prime contractor, to perform about $3,000,000 worth of plumbing and related construction work over a 2 year period on such a project owned by the Detroit Building Authority ("DBA"). The contract was awarded.

Respondent Turner Construction Company, the owner's construction manager that had little experience on similar projects, had wide-ranging duties to facilitate and expedite the project construction on a "fast track" basis:

> reviewing plans, specifications and schedules for the project with the professional services contractor so as to eliminate areas of possible conflict among separate contractors; reviewing specifications; establishing procedures for coordination among the owner, the professional services contractor, the prime contractors, the major subcontractors, and the construction manager; producing a schedule for accomplishing the project design effort; maintaining its full-time supervisory and inspection staff at the job site for the coordination and direction of the work of the contractors; and conducting job-site meetings to discuss procedures, progress, problems, scheduling, and equal employment opportunity.

John E. Green Plumbing & Heating Co., Inc. v *Turner Construction Company*, 500 F. Supp. 910, 911 (E.D. Mich. S.D. 1980).

Petitioner was required to expend twice as long (four years) and over twice as many man-hours as estimated to complete its work. (TV* 10, pp. 121-22; TV 11, p. 23). Consequently, Petitioner expended out-of-pocket about twice the direct costs originally estimated to finish its work. On this contract alone, Petitioner lost $2,351,785.

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* "TV" indicates Trial Volume.

Long before its work was substantially complete, Petitioner filed this diversity action pursuant to 28 U.S.C. § 1332(a)(1), seeking damages because:

(1) Respondent tortiously interfered with Petitioner's contractual relationship with the DBA (Count I); and

(2) Respondent negligently performed its construction management duties (Count II).

One and a half years before trial, the District Court granted Respondent a summary judgment dismissing Petitioner's negligence claims, reasoning that the "no damage for delay" clause in the Petitioner — DBA contract prohibited a negligence action against Respondent. Leave to amend was denied.

Trial concerned only Petitioner's "intentional" interference claim. Petitioner contended that Respondent's conduct was actionable merely if Respondent intentionally or deliberately did an act that Respondent knew or should have known would likely cause Petitioner damage. Respondent equally consistently contended that its conduct would not be actionable unless Petitioner proved that Respondent acted with fraud, bad faith and malice.

As a result of certain rulings at and immediately prior to trial, Petitioner's proofs of damages and other elements of its interference claim were severely restricted. Given the trial court's already published opinion granting a summary judgment dismissing Petitioner's negligence claims, Petitioner did not introduce or proffer other evidence tending to prove the elements of its negligence claims.

At the close of Petitioner's case-in-chief, the trial judge granted Respondent's motion for directed verdict. While no written opinion was issued, the trial judge stated from the bench:

Now I have sat here for nearly three weeks listening to testimony, and listening to it rather carefully. *I have yet to*

hear any testimony of an affirmative, wilful act, unreasonable interference with the contractors compliance. *At the very best I think this evidence shows that there has been negligence,* there may have been a lack of total evidence, there may have been a lack of total diligence, there may have been incompetence, there may have been failure to properly coordinate activities, but nothing have I heard in the proofs, nor is there anything from which you could draw an inference in the proofs in my opinion that would show wilful acts, unreasonable interfering with the contractor's compliance.

The no damage for delay clause was written with a specific purpose. The purpose of the contract was to insulate others from damages for the delay absent some wilful, intentional act.... The intent to do an act is not sufficient. It must be an intended interference to get around the no damage for delay clause. Therefore, I feel that there is nothing at all reasonable people would conclude that there is no factual issue for this jury. *I am going to grant the motion for directed verdict based upon that, upon what I have said up to date. However, I want to comment just for one second on the damages, not that I think that it is controlling because I think what I have already said is controlling and takes care of the directed verdict motion. I do feel, however, there has been a lack of proof of proximate cause of any damages.*

(Transcript, September 17, 1982, pp. 10-11)(emphasis added).

On August 29, 1984, the Sixth Circuit held that the trial judge committed two prejudicial legal errors: first, in granting Respondent summary judgment on Petitioner's negligence claims and, second, in ruling that Petitioner needed to prove Respondent's fraud, bad faith or malice to recover upon the interference claim. However, the Sixth Circuit found both

errors "harmless" because of Petitioner's allegedly inadequate proof of damages. The *bona fide* negligence claim was not remanded for trial because:

> Nonetheless, we do not believe that the trial judge's error requires a reversal of the ultimate decision in this case. Green was still allowed to go to trial on its first theory of liability, intentional interference with contract. After reviewing the record, we are confident that Green did not remove from its case any of its damage claims because of the trial judge's erroneous ruling on the negligence count.

John E. Green Plumbing & Heating Co., Inc. v *Turner Construction Co.*, 742 F.2d 965, 967 (6th Cir.), *reh'g denied*, (1984).

ARGUMENT

I.

DUE PROCESS IS DENIED WHEN A CIRCUIT COURT DEPRIVES A PARTY OF THE RIGHT TO TRY AN ACTIONABLE CLAIM BY SPECULATING AS TO THE PARTY'S DAMAGE PROOFS.

The Sixth Circuit correctly held — as Petitioner had urged — that the District Court's published opinion was legal error, namely, that the trial court erred in dismissing Petitioner's negligence claims on summary judgment.

However, rather incredibly, the Sixth Circuit rationalized the District Court's result, namely, refusing Petitioner a trial of the negligence claims. The Sixth Circuit's rationale essentially labels the erroneous summary judgment as "harmless error." Not surprisingly, Petitioner's research has uncovered no analogous case holding an erroneous summary judgment to be "harmless error."

Indeed, on its face, the Sixth Circuit's conclusion is inherently contradictory. The novel result was reached by the following judicial sophistry:

> Instead, it is apparent that Green simply attempted to prove that all of Turner's wrongful acts were done intentionally rather than negligently. Our conclusion in this matter is supported by Green's trial allegations that Turner was responsible for the entire 98,000 hours worked by Green employees in excess of the 76,000 originally budgeted.

Green Plumbing, *supra*, at 967. In other words, the Sixth Circuit speculates that:

> (1) if Petitioner had not been deprived of its right to try its negligence claims, Petitioner's damage proofs on its negligence claims would be *identical* to Petitioner's (allegedly insufficient) damage proofs on Petitioner's interference claim; and
>
> (2) Petitioner's allegedly identical damage proofs would be deficient to prove damages for negligence, not just interference.

The Sixth Circuit's two-fold supposition is not merely unsubstantiated. The Sixth Circuit's failure to grant Petitioner the right to try its negligence claims (including the damages proximately resulting therefrom) adversely affected Petitioner's "substantial rights" and, therefore, constitutes a deprivation of due process of law.

The applicable law concerning what constitutes a petitioner's "substantial right" is rather clear. A controlling statute, 28 U.S.C. § 2111, states:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

The seminal case of *Kotteakos* v *United States*, 328 U.S. 750 (1946), in interpreting the predecessor of that statute,* articulates the standard for judging whether a petitioner's "substantial rights" have been affected. Reasoning that reversal should not be based upon merely "technical errors," this Court concluded that the entire record must be examined to determine whether a "substantial right" has been adversely affected:

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily, the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.
>
> * * *
>
> But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum.
>
> * * *

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* The language of 28 U.S.C. § 391, which was substantially similar to 28 U.S.C. § 2111, provided:

> On the hearing of any appeal, certiorari, writ of error, or motion to new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude the substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand.

Id. at 762–65 (citations omitted).

A half century ago, this Court found, in analogous circumstances, a petitioner to be deprived of "substantial rights." *McCandless* v *United States*, 298 U.S. 342 (1936) holds that exclusion of evidence prejudicially affects "substantial rights" within the meaning of that precedent statute. There, the United States condemned a petitioner's land for federal public purposes, and the real dispute centered on valuing the land and its improvements. That petitioner sought to introduce evidence as to ways of making the land worth substantially more than the government claimed. The petitioner's proposed evidence concerned, primarily, means of irrigating the land and thereby enhancing its value. The trial judge supposed that such evidence was too remote and speculative and excluded it. On appeal, the Circuit Court held that the trial judge had erred, but concluded (as in the case at bar) that the error was "harmless" because petitioner had made no specific offer of proof. This Court disagreed. This Court first defined the issue to be "whether the ruling of the trial court refusing to admit certain evidence and offers of evidence was erroneous, and, if so, whether the rejection of said evidence may be disregarded as not substantially prejudicial...." *Id.* at 343. In reversing, this Court reasoned:

> The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence

> supplementing and dependent upon that which had been rejected. Faced with the ruling and implication, counsel was not required to offer further evidence along that line.
>
> * * *
>
> In this situation, § 269 [28 U.S.C. § 391] is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties." This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.

Id. at 347-48 (citations omitted)(emphasis in original).

Similarly, in the instant action another Circuit Court wants to rationalize that an erroneous summary judgment dismissing Petitioner's negligence claims does not warrant reversal by confidently assuming that "[Petitioner] did not remove from its case any of its damage claims because of the trial judge's erroneous ruling on the negligence count." *Green Plumbing*, *supra*, at 967. With what extrasensory perception is the Sixth Circuit blessed so as to know what Petitioner's damage proofs for its negligence claims would be, let alone whether they would be identical to Petitioner's damage proofs for interference?

The Sixth Circuit's factual presumption has deprived Petitioner of substantial rights and causes Petitioner great prejudice, namely, loss of the right to try a *bona fide* negligence claim worth millions of dollars. There is no evidence to support such wishful thinking. Not even the trial judge himself indulged in or suggested such an unwarranted assumption.

Moreover, Petitioner was precluded from making a separate, specific offer of damage proofs as to its negligence claims. Not only did the trial court *never* intimate that damage proofs might be an alternative basis for dismissal of the negligence claim, but the dismissal of that claim had occurred over a year before trial and was based on legal issues that had nothing to do with any damage issue. The trial court's earlier summary dismissal of the negligence claims effectively prevented Petitioner from offering, let alone introducing, evidence to prove damages proximately resulting from negligence:

> The action of the trial court...plainly meant that it would be useless [for Petitioner] to offer further evidence supplementing and dependent upon that which had been rejected.

McCandless, supra, at 347. Faced with the District Court's published opinion that, as a matter of law, Petitioner had no claim for negligence, Petitioner cannot be said to have been obliged to proffer at the trial of another claim specific proofs of one element of the claim dismissed long ago; otherwise, trial lawyers would be constantly compelled to stretch beyond all limits and exhaust the patience of trial judges.

True, notwithstanding dismissal of its negligence claims, Petitioner sought to recover its entire *out-of-pocket* loss from this one construction contract in the trial of its interference claim. However, that fact does not predetermine, factually or legally, what Petitioner's negligence damage claims or proofs would have been if a trial had occurred. Because not all of Respondent's allegedly actionable conduct constituted "negligence," Petitioner's proofs would — of necessity — have been more specific. In addition, Petitioner's negligence damage proofs would have included (1) damages for lost profits on other construction projects that Petitioner could not undertake because the DBA hospital project's time and cost overruns precluded Petitioner from obtaining other profitable business, and (2)

damages for Petitioner's diminished business reputation; neither category of damage was ever asserted concerning Petitioner's interference claim, at trial or otherwise. Thus, if proofs of the negligence claims had been appropriate, Petitioner would have presented a substantially broader and more specific spectrum of evidence.

But, as in *McCandless*, because the trial judge had erroneously foreclosed Petitioner's right to offer such proofs, it would have been useless — if not improper — for Petitioner to proffer evidence that supplemented and was dependent upon the negligence claims rejected and dismissed over a year earlier. The District Court heard no evidence as to what damages were proximately caused by Respondent's negligence. Petitioner's damage evidence presented at trial was, given the legal posture of the case (i.e., only the interference claim was being tried), submitted as being caused by Respondent's intentional acts. Not allowing Petitioner to prove Respondent's negligence and Petitioner's resulting damages is no mere "technical error." Therefore, this case should be remanded to the trial court so that Petitioner's evidence of negligence and damages proximately resulting therefrom may be heard by a trier of fact.

While Petitioner recognizes that a judgment may be sustained on any ground for which a reviewing court finds proper support *in the record*, *Jaffke* v *Dunham*, 352 U.S. 280, 281 (1957), there is absolutely nothing in the record of the case at bar to support the Sixth Circuit's sophistry and speculation that, if Petitioner had been allowed to try its negligence claims, Petitioner would have still failed to prove damages.

The due process denial to which the Sixth Circuit subjected petitioner was further aggravated by other legal errors committed by the District Court which the Sixth Circuit refused to address on appeal. First, the trial judge arbitrarily excluded from evidence scores of Petitioner's proposed exhibits that

constituted relevant and admissible documentary proof of Petitioner's damages; the trial judge did so as a sanction based upon his finding — which he later conceded to be erroneous — that Petitioner's counsel had made a misrepresentation; however, the trial judge never retracted the sanction and Petitioner's proofs, including its damage proofs, were less complete than Petitioner was entitled to submit. Accordingly, the trial judge's error in ordering sanctions was prejudicial to Petitioner's substantial rights, namely, it adversely impacted the element (Petitioner's inadequate damage proofs) upon which the Circuit Court predicated its affirmance of the trial court's result.

Second, the Sixth Circuit failed to address the propriety of the trial judge *sua sponte* setting aside his Magistrate's comprehensive order compelling Respondent to produce to Petitioner certain documents essential to supplement Petitioner's trial proofs, including damages. Petitioner had relied upon the Order in its trial preparation plans, and Respondent had not objected. Some of this material had been sought by Petitioner for over two years. While the trial court reasoned that it had accidentally referred the matter to the Magistrate, nothing in the District Court's prior orders had prohibited the parties from obtaining compliance with outstanding Orders to produce discovery or other materials. Thus, the Sixth Circuit failed to assess the propriety of the trial judge's action in light of 28 U.S.C. § 636(b)(1)(A), which empowers a Magistrate to enter certain non-dispositive orders. Moreover, because the Order compelled Respondent to produce certain uncontroversial materials, it is inconceivable that the Order was "clearly erroneous and contrary to law." *See Merritt* v *International Brotherhood of Boilermakers*, 649 F.2d 1013, 1017 (5th Cir. 1981). Petitioner's inability to obtain these materials, because the trial judge set aside the Magistrate's Order *sua sponte*, also directly impaired Petitioner's damage proofs upon which the Sixth Circuit's illogic is based.

These and other prejudicial errors committed by the District Court are issues that the Sixth Circuit failed to address even though they adversely affected Petitioner's proofs at trial of damages and other elements of its interference claim and, given the Sixth Circuit's reasoning, necessarily bear upon whether Petitioner is entitled to a trial of its negligence claims. Thus, the Sixth Circuit's failure to address those issues constitutes a deprivation of Petitioner's right to a hearing given the basis of the Sixth Circuit's disposition of this case, namely, a supposition that Petitioner's proofs of negligence damages would be identical to Petitioner's proofs of interference damages.

For the Sixth Circuit to review a record necessarily devoid of proof of all elements of a dismissed claim (negligence) and, then, to speculate that, even if Petitioner had been allowed to try that dismissed claim, Petitioner's proof as to one element (damages) of that claim would have been no different than Petitioner's proof of a similar element of another, different claim is blatant, highly prejudicial error that impairs Petitioner's substantial right to have its *bona fide* negligence claims tried fully and fairly.

II.

THE SIXTH CIRCUIT DENIED PETITIONER DUE PROCESS OF LAW BY FAILING TO FOLLOW ESTABLISHED FEDERAL PROCEDURAL STANDARDS AND MICHIGAN SUBSTANTIVE LAW IN REVIEWING THE DIRECTED VERDICT AGAINST PETITIONER.

A long-standing tenet of this Court is that, in assessing the propriety of a directed verdict, "the court of appeals [is], of course, bound to view the evidence in the light most favorable to [Petitioner] and to give it the benefit of all inferences which

the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Company* v *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

The Sixth Circuit, in interpreting Michigan law, has held that the standard for a directed verdict is whether there is "substantial evidence from which the jury could find in favor of the party against whom the motion is made." *Gootee* v *Colt Industries, Inc.*, 712 F.2d 1057, 1062 (6th Cir.), *reh'g denied,* (1983). *See also Id.* (in a diversity case, federal courts must apply state law in determining whether there is sufficient evidence for jury question). The *Gootee* court also reasoned that a directed verdict is proper only when, viewing all evidence in a light most favorable to the party opposing the motion, "reasonable men could come to but one conclusion from the evidence should a court remove an issue from the jury." *Id., citing In re Wood Estate,* 374 Mich. 278, 291, 132 N.W. 2d 35, 44 (1965). The *Gootee* Court concluded that an appeals court is to review "all evidence which properly *should* have been received, placing an obligation on an appellate court to consider rulings excluding evidence offered by the nonprevailing party." *Gootee, supra,* at 1062, *citing Warner* v *Kewanee Machinery & Conveyor Company*, 411 F.2d 1060 (6th Cir. 1969) (emphasis in original).

The established standard of Michigan law, which the Sixth Circuit prejudicially failed to apply in the instant case, is that trial judges are to "exercise extreme caution before removing an issue from the jury and...allow the jury to decide the issue even when only *scant evidence* is presented." *Stein* v *Continental Casualty Co.*, 110 Mich. App. 410, 425, 313 N.W.2d 299, 306 (1981), *citing Miracle Boot Puller Company, Ltd.* v *Plastray Corp.*, 57 Mich. App. 443, 446, 225 N.W. 2d 800 (1975)(emphasis added). Thus, in affirming the trial judge's directed verdict in the instant action, the Sixth Circuit totally ignored the standard by which it was required to review the questioned action.

The only clue, if that it is, to the Sixth Circuit's reasoning is found at page 967 of its Opinion: "Moreover, we agree with the trial judge that a verdict should have been directed against Green because it failed in its proof as to the damages caused by Turner." *Green Plumbing*, *supra*, at 967.

Petitioner submits that in light of the damage evidence submitted by Petitioner at trial, all evidence submitted by way of offers of proof, and the damage evidence which was wrongfully excluded by the trial judge* (see Argument I, *supra*), the Sixth Circuit erroneously failed to follow substantive Michigan law to the effect that only *scant* evidence of the *existence* and *cause* of damage is needed to defeat a directed verdict motion. *See e.g.*, *Allison* v *Chandler*, 11 Mich. 542, 548–55 (1863). See also *Chalender* v *United States*, 119 F. Supp. 186 (Ct. C1. 1954). As a result, Petitioner's due process rights were violated. Moreover, the Sixth Circuit's Opinion establishes dangerous precedent, namely, a virtually unattainable damage proof standard for complex construction litigation.

A. UNDER THE "TOTAL COST" METHOD, PETITIONER PROVED *PRIMA FACIE* THAT IT SUFFERED CERTAIN DAMAGES CAUSED BY RESPONDENT.

Both state and federal courts have long recognized the difficulties inherent in proving damages in the context of complex construction projects and therefore, have applied the "total cost" method. *See E.C. Ernst, Inc.* v *Koppers Company, Inc.*, 626

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* The trial judge excluded evidence, generally, on two grounds: (1) as recited in the Statement Of The Case, *supra*, the trial judge excluded evidence as sanctions and (2) because summary judgment was granted on Petitioner's negligence claim, evidence tending to prove such conduct was deemed irrelevant. Despite these obstacles, Petitioner made substantial and detailed offers of proof (See Transcript, September 1, 1982, pp. 2–10 and Transcript, September 16, 1982, pp. 38–52).

F.2d 324, 327-29 (3rd Cir. 1980) (damages, caused by delays, generated a variety of costs not easily or accurately segregated; therefore, total cost method acceptable); *Moorhead Construction Company, Inc.* v *City of Grand Forks,* 508 F.2d 1008, 1016 (8th Cir. 1975) (where existence of damages proven and no other feasible method to calculate damages, proper to apply total cost method); *WRB Corp.* v *United States,* 183 Ct. Cl. 409, 426 (1968) (application of total cost method proper where job estimate and actual costs reasonable and contractor not responsible for added expenses); *J.D. Hedin Construction Company, Inc.* v *United States,* 347 F.2d 235, 247 (Ct. Cl. 1965) (fact of construction damages was clear, but impossible to determine exact amounts; therefore, use total cost method); *United States For The Use Of United States Steel Corp.* v *Construction Aggregates Corp.,* 559 F.Supp. 414, 428 (E.D. Mich. S.D. 1983) (use of total cost method is consonant with Michigan law upon showing that Defendant is responsible for cost overrun) (hereinafter cited as *Construction Aggregates)*; and *Omaha Public Power District* v *Darin & Armstrong, Inc.,* 205 Neb. 484, 288 N.W.2d 467, 472-73 (1980) (inability to segregate damages and causes thereof not fatal, because total cost method provides reasonable basis to calculate damages). Courts applying the "total cost" method unanimously reason that its use is proper, because "the lack of certainty as to the amount of damages should not preclude the recovery." *J.D. Hedin, supra,* at 247.

Michigan's federal courts acknowledge that the total cost method is consistent with Michigan substantive law. In *Construction Aggregates*, another trial judge in the Eastern District of Michigan reasoned that, but for the plaintiff's failure to show that all of its claimed damages were caused by defendants, the total cost method would have been a proper measure of damages despite "the lack of guidance from the Michigan courts on this method of damage calculation...." *Id.* at 427. Even the trial judge in the instant action accepted the theory as valid Michigan law (Transcript, September 17, 1982, p. 11).

As will be shown, given all of the damage evidence presented at trial and all evidence which *should* not have been excluded by the District Court, the Sixth Circuit erroneously concluded that Petitioner failed to present *prima facie* evidence of the existence and causation of damages under the total cost method. Because Michigan susbtantive law was not followed, Petitioner's substantive rights have been prejudiced.

The total cost method is to be applied where: (1) the nature of losses make it impossible or highly impractical to determine the amount of each with a reasonable degree of accuracy; (2) a contractor's bid or estimate was realistic; (3) the contractor's actual costs are reasonable; and (4) the contractor was not responsible for the added expenses. *See Moorhead Construction Company, Inc.*, *supra*, at 1016. A review of the record, not to mention evidence that *should* have been admitted, clearly indicates that each of the above elements was proven. Each factor is discussed *seriatim*.

1. *THE NATURE OF PETITIONER'S LOSSES MAKE IT IMPOSSIBLE OR HIGHLY IMPRACTICAL TO DETERMINE THE AMOUNT OF EACH WITH A REASONABLE DEGREE OF ACCURACY.*

In presenting its damages proofs, Petitioner identified seventeen (17) categories of actionable interference committed by Respondent. The Sixth Circuit concluded that Petitioner failed to specifically show how each of those many categories affected a particular job being done or the amount of time the job would have taken absent the delay. *Green Plumbing*, *supra*, at 967-68. What the Sixth Circuit failed to recognize, however, is that it is virtually impossible on a complex construction project (e.g. 1,000,000 square feet of high technology hospital space within 5 floors and 4 "interstitial levels") to record and attribute to one cause or another each

item of work being performed by each worker each day over several years. Petitioner had upwards of 500 men working on the site at the same time (TV 12, p. 107); to document, let alone prove, the precise dollar amount of time that each worker spent performing each task and the precise extent to which worker's extra work was caused by a particular act of interference is, effectively, an impossibility.

The Sixth Circuit correctly observed that one of the damage witnesses, John Roose, gave two slightly different estimates (128% versus 125%) in apportioning Petitioner's manpower overrun among the 17 categories of Respondent's types of interference. The Sixth Circuit erroneously concluded, also, that the less than three (3%) percent discrepancy demonstrated Petitioner's inability to prove damages: the discrepency, if material, related to the accuracy of the amount of damages, not to the proof of proximate cause upon which the trial Judge comments. *Id.* at 967-68.

The Sixth Circuit failed to recognize that the 3% variation spread over the 17 categories is equivalent to a tiny fraction of the one (1%) percent error per category. In other words, the damages attributed to each category would only have to be adjusted by less than 0.2% (two-tenths of one percent) to reconcile the difference. This error is statistically insignificant; it is truly insignificant in determining whether there is *prima facie* proof of damages.

Moreover, the Court and the jury could fairly determine the exact dollar damages attributable to each of Respondent's types of interference by the simple arithmetic of multiplying the total damages ($2,351,785) proven by Petitioner times the percentage assigned to each category of interference.

Not only did Petitioner prove the amount of damages it suffered with sufficient specificity to overcome a directed verdict, Petitioner's proofs as to the *existence* and *cause* of damages were adequate under Michigan law and unrebutted. Petitioner's

employee, Michael Brunett, a highly qualified plumbing contract estimator, presented unrebutted testimony that: (a) Petitioner suffered $280,000 in damages caused by Respondent's failure to properly coordinate work (TV 10, p. 130; TV 11, p. 4; trial exhibit 25); (b) Petitioner lost $551,426 in labor costs caused by Respondent's failure to provide temporary heat (TV 11, pp. 5-8); (c) Petitioner lost $17,271 as a result of Respondent ordering walls to be erected before plumbing was in place (TV 11, pp. 9-14); and (d) Petitioner lost $580,000 as a direct result of actual interference by Respondent (TV 11, pp. 15-17). The foregoing, whether alone or coupled with Brunett's uncontradicted and unrebutted testimony that Petitioner's 96,666 man-hour overrun was *solely caused* by Respondent's act of interference (TV 11, p. 72), that Petitioner's total "cost" expended on the project equaled $4,588,426 not including overhead and profit (TV 11, p. 69), and that Petitioner's reasonable, preconstruction estimate for all costs, overhead, profit, and handling fees totalled $2,885,000 (TV 11, p. 128), constituted adequate *prima facie* evidence under Michigan substantive law to prove that Petitioner suffered damages as a result of Respondent's actionable interference.

2. *PETITIONER'S BID WAS REALISTIC.*

Petitioner's $2,885,000 bid was regularly prepared by Brunett who was a licensed master plumber and had been estimating similar projects for 20 years (TV 10, pp. 49-58). The methods Brunett used in reaching this figure were clearly and painstakingly detailed in his testimony (TV 10, pp. 89-116).

3. *PETITIONER'S TOTAL COSTS WERE REASONABLE.*

Petitioner's total cost overrun was computed by adding $1,879,904 in lost labor costs, $101,292 in lost material costs, and $352,588 in overhead and lost profits on this project alone. These figures total $2,351,785 (TV 13, p. 65). There was absolutely *no* testimony which showed these figures to be unreasonable or inaccurate.

4. *PETITIONER WAS NOT RESPONSIBLE FOR ADDED EXPENSES.*

Respondent was solely responsible for all delays suffered by Petitioner (TV 6, p. 12). This testimony stands unrebutted. Moreover, the record is completely devoid of any testimony tending to indicate Petitioner was in any way responsible for any added expenses. Brunett testified that Petitioner could have performed its plumbing work in the originally estimated 875 days and within the original man-hour estimate (TV 10, pp. 24–25). Respondent's interference was solely responsible for Petitioner's material overrun also (TV 10, p. 26).

B. UNDER ANY DAMAGE CALCULATION THEORY, PETITIONER PRESENTED *PRIMA FACIE* EVIDENCE OF DAMAGES.

Independent of the total cost method of proving damages, settled Michigan case law makes it clear that Petitioner was successful in presenting *prima facie* evidence that it sustained damages.

The Sixth Circuit's Opinion intimates that, while Petitioner may have suffered damages as a result of the wrongful act of Respondent, Petitioner's failure to allocate its damage claims between "those causes which were actionable and those which were not," meant that *all* damages claimed by Petitioner were insufficient as a matter of law. *Green Plumbing, supra,* at 968, *citing Lichter* v *Mellon-Stuart Company*, 305 F.2d 216, 220 (3rd Cir. 1962). However, in *Lichter*, the plaintiff made absolutely no attempt to segregate from the lump sum claimed as damages those amounts which were actionable (i.e., those caused by defendant's breach of contract) and those which were not (e.g., those caused by strikes). The Court concluded it was, therefore, proper to reject the entire claim. *Id.* at 219.

Moreover, while such used to be law of the Third Circuit, even that Court has narrowed the scope of *Lichter*. The Sixth Circuit in the case at bar failed to recognize that *E.C. Ernst, supra*, a more recent Third Circuit case, narrowed *Lichter* in concluding that *Lichter* was not to apply where the defendant's wrongful acts and/or omissions cause all of the damages claimed, as in the case at bar. *E.C. Ernst, supra*, at 327. Moreover, Michigan courts have *never* adhered to such a rigid damage proof standard. Consequently, the Sixth Circuit's reliance on *Lichter* is both misplaced and direct evidence that the Circuit Court prejudicially failed to apply the correct substantive law, namely, that of Michigan.

In the instant action, Petitioner did not submit a lump sum for damages, but it divided the total into seventeen areas of interference — *all* of which were actionable and properly attributable to Respondent as the Sixth Circuit itself concluded; this evidence stands unrebutted. Despite this *prima facie* proof, the Sixth Circuit concluded that, because Petitioner could not determine "how much of the extra work [Petitioner] performed on the project was caused by change orders (for which [Petitioner] *was* reimbursed by the City) and how much was caused

by the interferences of [Respondent]," *all* of Petitioner's damage proofs were insufficient as a matter of law. *Green Plumbing, supra*, at 967 (emphasis in original). However, a close review of the record reveals Petitioner *did* segregate its damages.

Petitioner's President testified that the total time estimated to complete the project was updated periodically to reflect change order work that was compensated and that the 76,413 man-hour estimated did include change order and bulletin work that was compensated (TV 13, pp. 53-4). Reviewing this evidence (especially in a light most favorable to Petitioner), there were no change order or bulletin hours in the man-hour overrun for which Petitioner sought recovery; the Sixth Circuit's contrary impression was plainly erroneous. Granted, Petitioner cannot precisely state what portion of the total man-hours on the job were attributable to paid-for change order work as opposed to contract work (TV 13, p. 78); however, while the testimony may suggest some imprecision in Petitioner's damage calculations, such does not indicate that adequate damage proofs were totally lacking. Thus, the Sixth Circuit's first level of inquiry was in error.

Michigan's well-settled substantive law is that a court is first to determine whether there is *prima facie* evidence that damages actually exist. As stated by the Michigan Supreme Court in *Godwin* v *Ace Iron & Metal Company*, 376 Mich. 360, 137 N.W.2d 151 (1965):

> [W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, "in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable." Particularly is this true where it is Defendant's own act or neglect that has caused the imprecision.

Id. at 368, 137 N.W.2d at 156. The Sixth Circuit's Opinion fails to draw a critical distinction between the existence and the amount of damages. The Court only stated that: "[W]e agree with the trial judge that a verdict should have been directed against Green because it failed in its proof as to the damages caused by Turner." *Green, supra*, at 967. The trial judge had concluded that, despite the seventeen areas of interference identified by Petitioner, Petitioner failed to prove that *any* of the 97,111 man-hour overrun was caused by Respondent. That conclusion cannot be rationalized given that *all* of the testimony regarding causation was *unrebutted*. It is even more impossible to rationalize given that the Sixth Circuit recognized two areas of interference, namely, Respondent failing to provide temporary heat during the winter season and Respondent allowing utility shafts to be bricked in before Petitioner was allowed to install plumbing. The court recognized that Respondent's misconduct "required a much greater expenditure of manpower than originally planned. . . ." *Green Plumbing, supra*, at 967 n.3.

Perhaps even more compelling is the fact that the Sixth Circuit failed to follow Michigan substantive law regarding proximate causation. As defined by the Michigan Supreme Court, proximate causation means:

> If a man does an act and he knows, or by the exercise of reasonable foresight should have known that in the event of a subsequent occurrence, which is not unlikely to happen, injury may result from his act, and such subsequent occurrence does happen and injury does result, the act committed is negligent, and will be deemed to be the proximate cause of the injury.

Fiser v *City of Ann Arbor*, 417 Mich. 461, 474, 339 N.W.2d 413, 418 (1983), *quoting*, *Tozer* v *Michigan Central R. Co.*, 195 Mich. 662, 666, 162 N.W. 280 (1917). The *Fiser* court went on to conclude: "The question of proximate cause is generally held

to be one for the jury. *Id.* at 475, 339 N.W.2d at 418. *See Comstock* v *General Motors Corp.*, 358 Mich. 163, 180, 99 N.W.2d 627 (1959). Any doubts about the relations between the cause and the effects should be resolved by the jury." *Fiser, supra*, at 475, 339 N.W.2d at 418.

The Sixth Circuit did not state whether it concluded that Petitioner failed to prove *prima facie* the existence of damages or the proximate cause of damages. Obviously, Michigan substantive law was not followed on either point, and not a single citation appears in either lower court's opinion on either point.*

The Sixth Circuit's Opinion ignores the problems inherent in proving damages in a complex construction project with a lengthy delay and huge man-hour overruns. Realistically, no party under those circumstances could meet the burden of proof ostensibly required by the Sixth Circuit, namely, greater precision than 97%. It is virtually impossible to specifically segregate complex construction damages hour by hour, man by man, job by job, and cause by cause. Nor do contractors estimate work as the Sixth Circuit presumed. To attempt to do so would require Petitioner to hire hundreds of extra personnel just to document inefficiency resulting from wrongful acts. Alternatively, each laborer would be required to learn what is compensated contract work, what is compensated change order work, and what is work resulting from actionable conduct; to determine the time required by each type of actionable conduct; and then to document the same to complete his task. Either alternative would substantially increase the cost of construction and severely diminish the efficiency of the workers.

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* The Sixth Circuit also failed to establish whether the criteria for causation and damages recoverable as to Petitioner's interference claim is the same for its dismissed negligence claims.

For the reasons stated above, the Sixth Circuit failed to follow Michigan substantive law and applied too stringent a standard regarding the level of proofs necessary to overcome a directed verdict motion. Because Petitioner's substantial right to a full and fair trial were impaired, the action of the lower courts ought to be corrected.

ÉQUEST FOR RELIEF

Based upon the foregoing, Petitioner respectfully requests that this Court issue an appropriate Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit.

Respectfully Submitted,

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APPENDIX

500 F. Supp. 910 (E.D. Mich S.D. 1980)

JOHN E. GREEN PLUMBING & HEATING COMPANY, INC., a Michigan Corporation, Plaintiff,

v.

TURNER CONSTRUCTION COMPANY, Defendant.

Civ. A. No. 79-70455.

United States District Court, E. D. Michigan, S. D.

Nov. 19, 1980.

OPINION

GILMORE, District Judge.

On July 10, 1975, defendant Turner Construction Company ("Turner") entered into a contract with the City of Detroit Building Authority ("DBA") in which defendant Turner agreed to serve as construction manager for the DBA in the construction of the New Detroit General Hospital. The duties which Turner assumed included, inter alia, reviewing plans, specifications and schedules for the project with the professional services contractor so as to eliminate areas of possible conflict among separate contractors; reviewing specifications; establishing procedures for coordination among the owner, the professional services contractor, the prime contractors, the major subcontractors, and the construction manager; producing a schedule for accomplishing the project design effort; maintaining a full-time supervisory and inspection staff at the job site for the coordination and direction of the work of

the contractors; and conducting job-site meetings to discuss procedures, progress, problems, scheduling, and equal employment opportunity.

Plaintiff John W. [sic] Green Plumbing & Heating Company, Inc., ("Green") is a plumbing and heating contractor who entered into a contract with DBA to do certain plumbing and mechanical work. It had no contractual relationship with defendant Turner, but, as pointed out above, Turner was responsible for many management duties which had an obvious bearing on Plaintiff's performance.

Plaintiff's contract contained a "no damage for delay" clause, which provided in pertinent part as follows:

EXTENSIONS OF TIME

ARTICLE 5. "Should the Contractor be delayed in the commencement, prosecution or completion of the work by the act, omission, neglect or default of the Manager, Owner and/or of anyone employed by the Manager, Owner, or of any other contractor or subcontractor on the Project, or by any damage caused by fire or other causalty or by the combined action of workmen in no wise chargeable to the Contractor's control and not due to any fault, neglect, act or omission on its part, then the Contractor shall be entitled to an extension of the time only, such extension to be for a period equivalent to the time lost by reason of any and all of the aforesaid causes, as determined by the Manager . . . ."

Plaintiff alleges in Count I of its complaint that defendant Turner has continually and intentionally interfered with plaintiff's work and the contractual relationship between plaintiff and DBA in numerous respects. Plaintiff lists 22 separate alleged transgressions of the defendant. Count II of plaintiff's complaint is grounded in negligence and incorporates by reference the same acts and omissions referred to in Count I.

Defendant filed this motion for summary judgment, alleging that the "no damage for delay" clause contained in plaintiff's contract with DBA precludes plaintiff from maintaining the causes of action embodied in Count I and Count II. In addition, defendant argues that plaintiff's negligence claim must fail because of the absence of contractual privity between plaintiff and defendant. The case is a diversity case, and squarely raises the issue of whether, under the law of Michigan, a sub-contractor can recover damages for the tort of intentional interference with contractual relations from a third party with whom it is not in privity of contract where the contract contains a "no damage for delay" clause which expressly bars any remedy other than an extension of time.

We start with the basic proposition that a "no damage for delay clause" is not in every case an absolute bar to recovery. Delays that are not within the contemplation of the parties at the time of entering into the agreement, delays arising from wrongful conduct of the owner or contractor, delays based upon fraud, bad faith, and direct or active interference in the work of the contractor are not covered by such clauses. See 74 A.L.R.3d 187, Construction Delay, at pages 213 through 215, where it is said:

> A "no damage" clause is not in every case an absolute barrier to recovery in situations within its terms, especially general terms encompassing "any" clause in the progress of the work or reason for delay attributable to the owner or contractee. Neither party can rely unreasonably on such a clause.
>
> [T]here are certain exceptions to the general rule that the contractor is bound by the contract he has entered into and that the "no damage" clause is enforceable. These exceptions embrace . . . delay which was not contemplated by the parties at the time of entering into the agreement, delay unreasonable in duration, and delay arising from wrongful

conduct of the owner or contractee, particularly fraud or bad faith, and direct or active interference by the contractee with the work of the contractor; and some cases also recognize exceptions as to delay caused by certain negligence of the contractee, or the contractee's breach of certain obligations of its contract.

There is no Michigan case directly on point, but two Court of Appeals decisions involve no damage clauses, and seem to support the ALR citation, supra. In *E. C. Nolan Co. v. Michigan*, 58 Mich.App. 294, 301, 302, 227 N.W.2d 323 (1975) a construction contract involved the following contradictory provisions:

"... No additional compensation will be paid to the contractor for any reasonable delay or inconvenience due to material shortages or *reasonable delays due to the operations of such other parties* doing the work indicated or shown on the plans or in the proposal." (Emphasis added)

"No claims for extra compensation or adjustment in contract unit prices will be made *on account of delay or failure of others to complete work units as scheduled.*" (Emphasis added)

The first quoted provision of the contract became a part of the contract as a result of the 1967 standard specifications for highway and bridge construction, and the second provision was the coordinating clause of the contract.

The Court of Appeals reasoned that the discrepancy between the two clauses created an ambiguity, and, therefore, plaintiff was only precluded from recovering damages for reasonable delays. The Court allowed plaintiff to recover under the contract.

In reaching its conclusion, the Court stated (pages 302 and 303):

To hold otherwise would be to say that regardless of how long a third party delayed, plaintiff would be required to

perform its part of the contract without any hope of reimbursement for any increased costs caused by the delay. We do not believe the department intended the coordinating clause to (be) so read, for if the effect of that clause were such as the Department contends, no responsible contractor would have entered into a contract on this project for the simple reason that the contractor would have no way of knowing how much it would cost it to perform or when it could expect to be finished with the project. A contractor can take a reasonably short delay into consideration when computing its bid on a project, but how could a contractor be expected to submit a competitive bid if it had to include in that bid expenses for a delay that could be of indefinite duration? We submit that a contractor could only complete a competitive bid if it were of the opinion that it would be reimbursed for additional expenses caused by unreasonable delays.

In *Cook* v. *Highway Department No. 2*, 55 Mich.App. 479, 223 N.W.2d 15 (1974) the contract contained the following clause:

> "No claims for extra compensation or adjustments will be allowed on account of deletions of work items or delay or failure of others to complete work units as scheduled."

Although the *Cook* Court gave effect to the clause and granted summary judgment for the defendant, it nevertheless implied that where there was sufficient basis to support a claim of fraud or misrepresentation, summary judgment would not be appropriate.

On page 487, the Court said:

> "Further, we fail to see how there can be fraud or misrepresentation when two full pages were devoted to calling attention to the Oakland County contract and further suggesting that the bidder cooperate with the contractors

on the third-party job. Apparently plaintiffs failed to do so before bidding. Finally, we observe that had plaintiffs been misled, the alleged omission was fully made known to them seven days before they voluntarily signed the contract. *A & A Asphalt Paving Co.*, supra, holds that in order to constitute fraud, the party making the misrepresentation must either know it was false when made or make it recklessly without any knowledge of its truth and as a positive assertion. . . ."

It is therefore clear that, had the facts been otherwise, and had fraud been shown, the *Cook* Court would have allowed the cause of action, even with the contract language quoted supra.

In the instant case, the "no damage for delay" clause could not possibly be read to encompass the deliberate and wilful interference with plaintiff's performance of the contract. These are the allegations in Count I. Therefore, defendant's motion for summary judgment as to Count I, which sufficiently pleads a cause for intentional interference with contractual relations, must be denied, for the contractual clause does not preclude recovery if a proper factual showing can be made to support the allegations of the complaint.

Count II of Plaintiff's Complaint is based upon negligence. For the same reasons which support the denial of defendant's motion for summary judgment as to Count I, the motion as to Count II must be granted. The Michigan exceptions to the general rule of enforceability established in *Nolan* and *Cook*, and the general law extend only to instances where the alleged conduct indicates bad faith or wilful conduct, or fraud or misrepresentation. Mere negligence is not sufficient to avoid the consequences of the "no damage for delay" clause. The plaintiff cannot accomplish under a negligence theory what could not be accomplished in contract.

It is therefore ordered that defendant's motion for summary judgment as to Count I of Plaintiff's Complaint be

denied, and defendant's motion for summary judgment as to Count II be granted.

742 F.2d 965 (1984)

JOHN E. GREEN PLUMBING AND HEATING COMPANY, INC.,
Plaintiff-Appellant,

v.

TURNER CONSTRUCTION COMPANY,
Defendant-Appellee.

No. 83-1116.

United States Court of Appeals,
Sixth Circuit.

Argued June 7, 1984.
Decided Aug. 29, 1984.
Rehearing Denied Nov. 6, 1984.

Before MARTIN and KRUPANSKY, Circuit Judges, and McRAE, Chief District Judge.*

BOYCE F. MARTIN, Jr., Circuit Judge.

In this diversity case, Green Plumbing and Heating appeals the district court's summary judgment and directed verdict in favor of Turner Construction Company. The main issues on appeal are the effect to be given a "no-damage-for-delay" clause in Green's construction contract with the City of Detroit and the adequacy of Green's proof of damages.

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* Honorable Robert M. McRae, Jr., Chief United States District Judge for the Western District of Tennessee, sitting by designation.

Green Plumbing was the plumbing and fire-sprinkler contractor for construction of the new Detroit General Hospital. Turner Construction was the construction manager for the project. As such, its duties included reviewing work schedules for the project to eliminate potential conflicts between the various contractors and conducting job-site meetings to resolve those conflicts which did arise despite all precautions. Green's contract with the City of Detroit Building Authority included a "no-damage-for-delay" clause.[1] This clause prevented Green from collecting damages for delay caused by anyone connected with the project, including Turner.

In carrying out its duties under its contract, Green claims to have encountered numerous problems caused by Turner's mismanagement of its oversight responsibilities: contractors were doing work out-of-sequence, no temporary heat was provided, and design changes took too long to be approved. Some of these problems, like the slow approval of design changes, simply caused a delay in the completion of Green's work. Other problems, like the lack of temporary heat and the out-of-sequence work, caused Green to employ more manpower resources to get the job done. As a result of these difficulties, Green claims to have lost a great deal of money.

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[1] The relevant clause reads as follows:

> Should the Contractor [Green] be *delayed* in the commencement, prosecution or completion of the work by the act, omission, neglect or default of the Manager [Turner], Owner and/or anyone employed by the Manager, Owner or any other contractor or subcontractor on the Project, . . . then the Contractor shall be entitled to an extension of time only, such extension to be for a period equivalent to the time lost by reason of any and all of the aforesaid causes . . . .

(emphasis added).

In 1979, some three years after the project began, Green filed suit against Turner on two separate theories of liability: (1) Turner intentionally interfered with Green's contractual relationship with the City of Detroit; and (2) Turner negligently performed its construction management duties. The trial judge granted summary judgment in favor of Turner on the second count, *see John E. Green Plumbing & Heating Co. v. Turner Construction Co.*, 500 F.Supp. 910 (E.D.Mich.1981), ruling that the "no-damage-for-delay" clause prohibited all claims by Green against Turner based on negligence.[2] At trial, he granted a directed verdict for Turner on the first count at the close of Green's evidence because Green failed to show that Turner acted with fraud, bad faith or malice towards Green. Green now appeals from both rulings.

No-damage-for-delay clauses "are commonly used in the construction industry and generally recognized as valid and enforceable." *W.C. James, Inc. v. Phillips Petroleum Co.*, 485 F.2d 22, 25 (10th Cir. 1973). *See also* 74 A.L.R.3d 187 (1976); 13 Am.Jur.2d, Building and Construction Contracts, § 52 (1964). However, because of their harsh effects, these clauses are to be strictly construed. *See, e.g., E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*, 551 F.2d 1026, 1029 (5th Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978). In our case, the clause at issue forbids damages "should the Contractor be *delayed* in the commencement, prosecution, or completion" of the project. Green argues rather forcefully that this phrase, strictly construed,

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[2] The trial judge seemed to assume that a direct, contractual relationship between Green and Turner was not necessary to create a duty in Turner to Green. This assumption is correct. Turner's contract with the city of Detroit made Green a third-party beneficiary of that contract. Any failure on Turner's part to carry out its management duties under the contract would make it liable for Green's economic losses incurred in reliance upon adequate performance of those duties. *See Williams v. Polgar*, 391 Mich. 6, 215 N.W.2d 149 (1974).

only bars *delay* damages and not other kinds of damages, such as damages for hindering work on the project. *Accord Lichter v. Mellon-Stuart Co.*, 305 F.2d 216, 218–19 (3d Cir.1962). Under this interpretation, delay means time lost where work cannot be performed because essential supplies have not been delivered or necessary preliminary work has not been performed. Delay damages, then, refers simply to the cost of an idle workforce.

We agree with Green. In this context, Green is not arguing that it suffered damages from delay, but rather that it suffered damages from obstacles created by Turner.[3] And because at least a portion of Green's claimed damages related to extra manpower costs incurred as a result of Turner's hindrances — failure to properly coordinate work on the project and failure to ensure that temporary heat was provided —, it was error for the trial judge to grant summary judgment against Green on this issue.

We note that our reading of this clause is not inconsistent with results reached in other cases where "no-damage-for-delay" clauses were used to deny recovery. In many of those cases, the damages being sought were simply delay damages. Moreover, the clauses being construed often barred damages resulting from any delay or *hindrance*. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1339 (7th Cir. 1983) ("delayed . . . or obstructed or hindered"); *Peter Kiewit Sons Co. v. Iowa Southern Utilities Co.*, 355 F.Supp.

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[3] One example of an alleged hindrance will suffice. The mechanical and electrical systems on each floor of the hospital were connected to each other through numerous vertical shafts running from the top to the bottom of the building. The masonry contractor was allowed to brick in many of these shafts before the plumbing work was completed. As a result, Green's plumbers were required to finish the job dangling from rope ladders suspended from the top. This required a much greater expenditure of manpower than originally planned although it did not necessarily delay Green's completion of the work.

376, 383 (S.D. Iowa 1973) ("no claim . . . for hindrances or delays"); *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816, 822 (1974) ("no payment . . . for damages because of hindrance or delay"); *Western Engineers, Inc. v. State Road Comm'n*, 20 Utah 2d 294, 437 P.2d 216, 217 (1968) (no damages for "any delay or hindrances").

Nonetheless, we do not believe that the trial judge's error requires a reversal of the ultimate decision in this case. Green was still allowed to go to trial on its first theory of liability, intentional interference with contract. After reviewing the record, we are confident that Green did not remove from its case any of its damage claims because of the trial judge's erroneous ruling on the negligence count. Instead, it is apparent that Green simply attempted to prove that all of Turner's wrongful acts were done intentionally rather than negligently. Our conclusion in this matter is supported by Green's trial allegations that Turner was responsible for the entire 98,000 hours worked by Green employees in excess of the 76,000 originally budgeted.

Moreover, we agree with the trial judge that a verdict should have been directed against Green because it failed in its proof as to the damages caused by Turner. For example, one Green witness testified that neither he, nor anyone else, could determine how much of the extra work Green performed on the project was caused by change orders (for which Green *was* reimbursed by the City) and how much was caused by the interferences of Turner. Furthermore, Green's damage witness, John Roose did not provide any evidence as to how he arrived at his estimates for the increase in total hours worked on the project caused by each of Turner's alleged wrongful acts. For example, Roose estimated that Turner's failure to ensure the provision of temporary heat caused a twenty-five percent overrun in manpower on the project. However, he offered no testimony about the kinds of work affected by the lack of temporary heat or the amount of time the job would have required

had temporary heat been provided. The same criticism extends to the other sixteen alleged causes of delay. Turner's failure to prevent the masonry contractor from bricking in the utility shafts before Green finished installing the plumbing allegedly caused a fifteen percent increase in manpower expended. Yet there are no figures provided for how much time installation of the plumbing in the shafts would have taken absent the premature masonry work. And so forth. It appears that Roose simply took the total figure for increased hours spent on the project and divided it into seventeen rather arbitrary categories.[4]

We recognize that "the law does not require impossibilities" when it comes to proof of damages, but it does require whatever "degree of certainty tha[t] the nature of the case admits." *Schankin v. Buskirk*, 354 Mich. 490, 497, 93 N.W.2d 293 (1958). A damage award must not be based on "mere speculation, guess, or conjecture." *Zirin Laboratories Int'l v. Mead-Johnson & Co.*, 208 F.Supp. 633 (E.D.Mich.1962). In this case, Green certainly had it within its power to provide the court with an accounting for the number of extra hours caused by change orders for which it was paid. Green also should have been able to provide a breakdown by job activity for the number of hours that would have been required in the absence of malfeasance by Turner in the performance of its construction management duties. Because of its failure to do these things, there was "no basis for allocation of the lump sum [claimed] between those causes which were actionable and those which were not," making "it proper to reject the entire claim." *Lichter v. Mellon-Stuart Co.*, 305 F.2d at 220.

Accordingly, the decision of the district court is affirmed.

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[4] Roose's original estimates for Green's damages was based on a manpower overrun of 125%. However, on cross-exam, it became apparent that the increase in manpower cost over the bid estimate was actually 128%. Undaunted, Roose proceeded to add two percentage points to lack of temporary heat and a third to another category.

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No. 84-1501

In the Supreme Court of the United States

October Term, 1984

JOHN E. GREEN PLUMBING & HEATING COMPANY, INC.,
Petitioner,

vs.

TURNER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly apply state law in affirming a directed verdict for respondent on the ground that petitioner had failed to prove damages with a sufficient degree of certainty?

2. Did the Sixth Circuit err in finding that the District Court's grant of summary judgment in favor of respondent on petitioner's negligence claim was harmless error under the circumstances of this case?

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No. 84-1501

In the Supreme Court of the United States

October Term, 1984

JOHN E. GREEN PLUMBING & HEATING COMPANY, INC.,
Petitioner,

vs.

TURNER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Turner Construction Company[1] entered into a contract with the City of Detroit Building Authority ("DBA") on July 10, 1975, to serve as construction manager for the DBA in the construction of the Detroit General Hospital project. As construction manager, respondent was required to perform certain coordinating functions and to serve as an advisor to the DBA in the construction process.

1. Turner Construction Company is a subsidiary of The Turner Corporation.

In June 1976, the DBA awarded the plumbing contract to petitioner John E. Green Plumbing & Heating Co., Inc., one of numerous contractors on the project. Petitioner contracted directly with the DBA. Petitioner, like all other contractors on the project, had no contractual relationship with respondent, the construction manager.

On February 2, 1979, before completion of the hospital project, petitioner filed suit against respondent for damages allegedly resulting from delays in completion of the plumbing work. The complaint set forth two claims, (a) that respondent intentionally interfered with petitioner's performance of its contract with the DBA, and (b) that respondent negligently performed its duties as construction manager. The complaint sought the same damages under each claim.[2]

On November 19, 1980, the District Court granted summary judgment to respondent on the negligence claim on the ground that such claim was barred by the "no damages for delay" clause in the plumbing contract. *John E. Green Plumbing & Heating Company, Inc. v. Turner Construction Company*, 500 F. Supp. 910 (E.D. Mich. 1980).

Trial commenced on the claim of intentional interference in August, 1982. During the trial, petitioner's witnesses acknowledged that not all delays were caused by respondent, but many delays had been caused by the actions of the DBA and the architect in approving change orders, the actions and inactions of other contractors, disputes among contractors, and disputes between contractors and the architect. (See TV 3, pp. 111-112, 114, 118 *et seq.*; TV 6, pp. 92-95; and TV 7, pp. 33-34.)[3] Notwithstanding that the

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2. Petitioner revealed for the first time at trial that it sought as damages the total cost of performing the plumbing work in excess of its original bid price.

3. "TV" refers to Trial Volume.

delays claimed by petitioner were from multiple causes, petitioner's damage witness testified that his damage calculation was based on the premise that every item of delay experienced by petitioner was directly attributable to respondent's actions (TV 7, p. 80). Another of petitioner's witnesses admitted that he did not know how many of petitioner's man-hours on the project were attributable to contract work as opposed to change order work, for which petitioner had been paid by the DBA, and that petitioner would never be able to make that determination (TV 13, pp. 65, 79-80).

At the close of petitioner's case, the District Court directed a verdict in favor of respondent on two grounds. First, petitioner had failed to present any evidence that respondent had intentionally interfered with petitioner's work. Second, petitioner had failed to present any evidence from which a jury could determine without sheer speculation what damages, if any, had resulted from respondent's conduct, as distinct from the actions of others.

On appeal the Sixth Circuit held that the trial judge erred in dismissing the negligence claim on the basis of the "no damages for delay" clause, but that this error[4] by the District Court did not require a reversal of the judgment. The Court of Appeals found that petitioner had sought precisely the same damages under both the negligence and intentional interference claims, and that all damage testimony had been received into evidence during the intentional interference trial. There was no need,

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4. Petitioner misstates the decision of the Sixth Circuit by asserting that such court found two prejudicial legal errors had been committed by the District Court. Petition for Writ of Certiorari at 3. The only error found by the Sixth Circuit was that the District Court erroneously granted summary judgment based upon its interpretation of the effect of the "no damages for delay" clause.

therefore, to retry the case when the damage testimony was so deficient as to warrant a directed verdict for respondent on damages. The Court of Appeals held that the District Court correctly had directed a verdict against petitioner because petitioner failed in its proof as to damages allegedly caused by respondent, irrespective of the liability theories involved. Petitioner's evidence provided:

> "no basis for allocation of the lump sum [claimed] between those causes which were actionable and those which were not," making "it proper to reject the entire claim." *Lichter v. Mellon-Stuart Co.*, 305 F.2d [216] at 220 [(3rd Cir. 1962)].

John E. Green Plumbing & Heating Company, Inc. v. Turner Construction Company, 742 F.2d 965, 968 (6th Cir.), *reh'g denied* (1984).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petition Sets Forth No Reason Sufficient to Support Issuance of the Writ.

Rule 17 of the rules promulgated by this Court clearly states that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are "special and important reasons" therefor. Rule 17.1 lists the primary reasons that will be considered by the Court in exercising its discretion:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial pro-

ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * * * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition[5] sets forth no "special and important reasons," within the parameters of Rule 17.1, why this Court should exercise its discretion to review this case.

The petitioner does not assert that the decision below conflicts with the decision of another federal court of appeals, which is the first justification under Rule 17.1(a) for review by the Court.

Nor does the petition fall within the second reason specified by Rule 17.1(a) for review, which requires the decision to be in conflict with a state court of last resort on a federal question. Petitioner has not even asserted that the decision below conflicts with a decision of the Michigan Supreme Court; and, more importantly, there is no federal question involved in this case. This was a diversity action for common law tort damages allegedly incurred during construction of a municipal hospital project. The entire claim was derived from and governed by Michigan state law. Since no federal question is involved, the petition also does not raise either of the reasons for

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5. The original petition, presented for filing on March 6, 1985, was returned by the Clerk to petitioner as a result of defects in the form of the petition. The time for filing this brief in opposition thus was extended until thirty days after respondent's receipt, on March 25, 1985, of corrected copies of the petition.

review contained in Rule 17.1(c), each of which concerns only federal questions.

The only attempted justification proffered in the petition to support this Court's review of the issues is the argument that the Court of Appeals failed to follow Michigan law in reviewing the directed verdict against petitioner. An assertion that a federal court failed properly to apply state law is no longer a proper reason to ask this Court to review a case, such reason having been eliminated in the 1980 revision of this Court's rules. *Compare* Rule 19.1(b), Supreme Court Rules, effective July 1, 1970, with Rule 17.1(a), Supreme Court Rules, effective November 21, 1980. Furthermore, the "failure-to-follow-state-law" argument is totally lacking in merit here.

Petitioner has asserted here for the first time in the course of this litigation that the court below failed to apply a Michigan standard for reviewing a directed verdict, which petitioner now contends requires only "scant evidence" to create a jury question on an issue. Since petitioner failed to raise the "scant evidence" argument in the court below,[6] it should not be permitted to raise a new issue concerning the scope of state law for the first time before this Court. Additionally, the record and the decisions below contain no indication whatsoever that an improper standard of review in fact was utilized.

Petitioner also argues that the court below failed to apply Michigan substantive law regarding the "total cost"

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6. Petitioner relies on two state cases to support its "scant evidence" standard of review, *Stein, Hinkle, Dawe & Assoc., Inc. v. Continental Casualty Co.*, 110 Mich. App. 410, 313 N.W.2d 299 (1981) and *Miracle Boot Puller Co., Ltd. v. Plastray Corp.*, 57 Mich. App. 443, 225 N.W.2d 800 (1975). However, neither case was cited by petitioner in its Brief of Plaintiff-Appellant, the Reply Brief of Plaintiff-Appellant, or the Petition for Rehearing In Banc before the Sixth Circuit, nor was the "scant evidence" standard otherwise presented in those briefs.

method of proving damages in a construction case. Wholly apart from the fact that a federal court's application of state law generally does not provide a reason for granting a writ of certiorari, this argument is fatally flawed, because petitioner has not demonstrated that the total cost method in fact is part of the substantive law of Michigan.

The only case cited by petitioner for its hypothesis that the total cost method is part of the substantive law of Michigan is not even a Michigan state court case. *See United States for the Use of United States Steel Corp. v. Construction Aggregates Corp.*, 559 F. Supp. 414 (E.D. Mich. 1983). Furthermore, rather than establishing that the total cost method is part of Michigan substantive law, the district court in *Construction Aggregates* expressly noted the "lack of guidance from the Michigan courts on this method of damage calculation", *id.*, 559 F. Supp. at 427, and the court refused to apply the total cost method to the facts of that case. Thus, the only precedent is, if anything, contrary to petitioner's position; and there certainly is no basis presented for petitioner's argument that the court below failed to apply the correct state law for measuring damages.

Petitioner has failed to set forth a single appropriate reason to bring this case within that select group of cases for which there are sufficient "special and important reasons" for this Court to exercise its discretion in favor of review. Rule 17.1. The writ should be denied.

2. The Petition Does Not Raise Constitutional Issues, but It Only Seeks Routine Appellate Review of Issues Governed by Well Established Legal Rules.

The two Questions Presented in the petition are couched in terms of a "denial of due process of law," but even a cursory examination of petitioner's assertions reveals that no issues of due process are involved here.

In the first of its Questions Presented, petitioner asserts a denial of due process from the court's refusal to remand its negligence claim for trial. Once this Question is stripped of its constitutional hyperbole, it becomes clear that petitioner merely seeks to have this Court review the Sixth Circuit's determination of harmless error.

In the decision below, the Sixth Circuit recognized that petitioner sought at trial to recover the entire manpower and cost overrun in excess of its original bid estimates as its damages. However, the District Court correctly found that petitioner had failed to prove that the entire cost overrun was attributable to the conduct of respondent, and had failed to prove a basis for allocation of the cost overrun between those causes allegedly attributable to respondent and those that were not. Consequently, the grant of summary judgment on the negligence count, although deemed to be error, was harmless since petitioner sought no more or different damages than the same entire cost overrun, regardless of the liability theory, whether negligence or intentional harm.

Petitioner cited no authority for its proposition that a court's adverse ruling on a question of harmless error constitutes a denial of due process. That omission is quite understandable, because questions of harmless error are commonplace judicial determinations without constitutional implications. This Court's limited time and attention simply should not be taken up in reviewing issues of harmless error, regardless of whether or not the question is couched in terms of an asserted denial of due process.

Within its argument under the first Question Presented, petitioner also asserts that it was denied due process when the trial judge excluded some of its proposed

exhibits as a sanction. Not only is there no basis in law for petitioner's position, but the facts allegedly supporting that position are seriously misstated.[7] Furthermore, the order excluding proposed exhibits would not rise to the level of a denial of due process even if it were entered erroneously—which it was not.

In its second Question Presented, once that Question is reduced to its essence, petitioner merely requests a review of the evidence to determine whether the District Court properly directed a verdict against petitioner on the issue of damages. The District Court heard almost three weeks of petitioner's testimony, and the Sixth Circuit reviewed the lengthy record of trial. Each court weighed the evidence pertaining to damages, and each concluded that petitioner had failed in its proof of damages. Petitioner's disagreement with the weighing of such evidence by the courts below, however, does not raise the directed verdict issue to constitutional proportions. If such were the case, *every* grant of a directed verdict would have constitutional implications.

Rather than raising genuine constitutional issues for review, the petitioner's request for this Court's intervention involves routine appellate review on a question of harmless error, and sifting through a lengthy record, evaluating and reweighing the evidence of damages to determine if the trial court properly granted a directed

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7. Petitioner asserts that the judge excluded the proposed exhibits as a sanction based upon a finding that petitioner's counsel made a misrepresentation and that the trial judge later conceded error on this point. Petition for Writ of Certiorari at 11. These assertions are false. The record demonstrates that the sanction was imposed as a result of petitioner's direct violation of the court's duly entered pretrial order requiring marking and exchange of proposed trial exhibits. At no time did the trial judge concede any error, either as to his ruling or as to the factual basis therefor.

verdict. These are at best functions for the Circuit Court of Appeals. Certainly, neither issue is sufficiently important to the public to warrant any of this Court's time and attention. Clearly, this Court does not sit merely as another tribunal of errors and appeals, as the petitioner would have it become. Issuance of a writ of certiorari is not appropriate here.

3. The Court Below Gave Full Consideration to the Issues and Decided Them Correctly.

The court below did not speculate on petitioner's "damage proofs", as petitioner states in the first point of its argument. The Court of Appeals merely recognized that petitioner sought to recover the entire manpower and cost overrun in excess of its original bid estimates under its intentional interference count. Petitioner even admits that it "sought to recover its entire *out-of-pocket* loss from this one construction contract in the trial of its interference claim." Petition for Writ of Certiorari at 9 (emphasis in original).

It was evident from the complaint and the record that if petitioner sought to recover its entire cost overrun under the intentional interference count, petitioner could seek no more than the very same cost overrun under the negligence count. The damages claimed under each of these two tort claims are identical; the evidence to establish those damages under either liability theory is the same, and all such evidence had been admitted. The only difference between petitioner's two theories is the degree of culpability required to establish liability.

Petitioner's failure as a matter of law to prove damages with a reasonable degree of certainty under the intentional interference claim necessarily means that it

could have fared no better had it also been permitted to present its claim for liability under a negligence theory. The Sixth Circuit correctly held that the trial court's error in granting summary judgment on the negligence claim did not require a reversal of the judgment for respondent. The Court of Appeals was not required to speculate as to petitioner's "damage proofs," since all the damage testimony had been offered, and it still fell short.

Petitioner suggests that its proofs would have been different and more specific if it had tried the claim on a negligence theory—that it would have sought additional elements of damage pertaining to diminished business reputation and profits from other lost business opportunities. This suggestion is patently groundless. These elements of damage were never claimed in the complaint, and petitioner made no effort to adduce any such evidence at trial, despite having asserted every possible penny of loss connected with the plumbing work. The Sixth Circuit correctly concluded that petitioner's damages would not have been more expansive in a negligence action than in the intentional interference action, since there are no elements of damage that could have been asserted in a negligence claim which could not also have been asserted in the intentional interference claim.

The Sixth Circuit also correctly refused petitioner's invitation to apply the total cost method of determining damages. The evidence at trial irrefutably established that not all delay or interference was attributable to respondent's alleged improper conduct. Some delay was attributable to actions of the owner, the architect and other contractors, as well as to petitioner itself. Further, petitioner was unable to establish what portion of its claimed extra man-hours were attributable to change or-

ders for which it had been reimbursed by the project owner.

As noted by the district court in *United States for the Use of United States Steel Corp. v. Construction Aggregates Corp.*, 559 F. Supp. 414 (E.D. Mich. 1983), cited by petitioner, there is "potential harm" in utilizing the total cost method because it "would permit [plaintiff] to recover all losses notwithstanding their nature or cause", and to permit such recovery "would force [defendant] to pay for loss it did not cause". *Id.*, 559 F. Supp. at 427. The total cost method cannot be utilized where the defendant is not responsible for all the delay or added expense, *id.*, such as in this case.

The evidence here precluded application of the total cost method of determining damages. The court below correctly weighed petitioner's unreliable, chaotic and indiscriminate damages evidence and concluded that petitioner had failed to prove a basis for allocation of the lump sum claimed between those causes which were actionable and those which were not, thereby making it mandatory to reject the entire claim. *John E. Green Plumbing & Heating Co., Inc. v. Turner Construction Company, supra*, 742 F.2d at 968, citing *Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3d Cir. 1962). *Accord, United States for the Use and Benefit of Shields, Inc. v. Citizens and Southern National Bank of Atlanta, Georgia*, 367 F.2d 473 (4th Cir. 1966).

The petitioner presented no evidence from which a jury could have assessed damages against respondent without resorting to speculation, guess or conjecture. The Sixth Circuit correctly affirmed the directed verdict against petitioner on the issue of damages. There is no warrant to have that appellate determination reviewed anew in this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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